IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. .

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

POLLIS & PAPPAS,
Attorneys for Petitioner,
125 Broad Street,
Elizabeth, New Jersey.

SAM WEISS,
On the Petition,
749 Scotland Road,
Orange, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4794

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OCTOBER TERM, 1959.

No.

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Gold Fuel Service, Inc., a corporation of the State of New Jersey, hereinafter referred to as Gold, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in this case on June 6, 1960, by mandate of said court (Appendix B), which affirmed an order for summary judgment (R34a), in favor of the defendant, Esso Standard Oil Company, a corporation of the State of Delaware, hereinafter referred to as Esso, entered January 8, 1960 in the Superior Court of New Jersey, Chancery Division.

Opinions Below.

The opinion of the Supreme Court of New Jersey, affirming the order for summary judgment, is reported in 32 N. J. 459, and is printed in the Appendix hereto, as Appendix A.

The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 59 N. J. Super. 6, and is also printed in the Record filed herewith (R23a).

Gold's main brief below is being submitted to this Court following the filing hereof.

Jurisdiction.

The mandate of the Supreme Court of New Jersey, affirming the order for summary judgment, is dated June 6, 1960, and is printed in Appendix B hereto.

This Petition was filed within 90 days from the date of said mandate in accordance with the rules.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. secs. 1257, 2101.

Questions Presented.

1. Where a price given to a competitor's customer is less than the figure at which the competitor can buy for resale, is not a sale at such price in violation of 15 U. S. C. sec. 13a, as unreasonably low and for the purpose of destroying competition or eliminating a competitor?

2. Where such sale is but one of a series of similar sales direct to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase in the fuel oil market for resale, and such sales are in interstate commerce, are not such sales in violation of 15 U. S. C. sec. 2, as an attempt to monopolize a part of interstate commerce?

3. Does not such sale give rise to a common law action in tort for damages for unfair competition, in that Esso's competition with Gold was conducted by illegal means, per violation of U. S. C. secs. 2 and 13a?

4. Did not the New Jersey courts have jurisdiction to adjudicate that Esso had been and is guilty of unfair competition by unlawful means, i. e., in violation of such federal statutes?

5. Is a common law action in a state court for unfair competition, by means in violation of U. S. C. secs. 2 and 13a, one for the enforcement of such statutes?

6. May not section 13a of Title 15 be enforced directly in a state court suit for damages other than treble?

7. Can the fact that Esso was invited to bid by Gold's customers excuse a violation of sections 2 or 13a of Title 15?

Constitutional and Statutory Provisions Involved.

Article VI, clause 2, of the Constitution of the United States.

15 U. S. C. secs. 2, 13a.

Statement of the Case.

The amended complaint (R6a) is in two counts. The first count is for compensatory and punitive damages (R9a), and the second count for accounting and injunctive relief (R10a). The second count was expressly abandoned below.

The first count alleges that Gold's predecessor was, for many years prior to December 10, 1957, in the business of fuel oil distribution to industrial and other consumer-level users in northeastern portions of New Jersey; that on December 10, 1957 Gold was formed, which absorbed all the business, good will and assets of the predecessor partnership and continued the business of the partnership, and, in particular, the servicing of the accounts of two consumers, Cooper Alloy Corporation and Stainless Engineering & Machine Works (hereinafter referred to as Cooper and Stainless); that these accounts constituted the major portion of the business and income of Gold and its predecessor, to the extent that the loss of the account would cause Gold to suspend or cease operations; that Gold and its predecessor, for 24 years, sold fuel oil to Cooper and Stainless at an average margin of profit of 3¢ per gallon (wherever figures are given, they refer to the rate per gallon), which fuel oil it purchased from independent suppliers at a rate

permitting such profit; that said profit rate has been standard in the industry, and independent suppliers and major companies, including Esso, have been selling fuel oil to wholesalers and distributors on such profit margin; that on or about December 13, 1958 Esso induced Cooper and Stainless to terminate their relations with Gold by offering to sell fuel oil to Cooper and Stainless at a rate below that at which Esso and other major companies and independent suppliers had been selling to distributors like Gold; that Esso sold to Cooper and Stainless at 10.2¢, a rate substantially below that at which Gold could purchase fuel oil from any suppliers in the industry, whether major or independent; that such action on the part of Esso constituted unfair competition. The first count further charges that such sale is but one of a series of similar sales to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase fuel oil for resale, and thus is an attempt by Esso to monopolize a part of interstate commerce in fuel oil, in violation of 15 U. S. C. sec. 2; that Esso is engaged in interstate commerce, giving the particulars thereof (par. 12, R9a); that the sale was without legal justification and therefore is not fair and lawful competition and constitutes a violation of 15 U. S. C. sec. 13a; and that Esso is liable to Gold in the sum of $500,000 as compensatory and punitive damages.

Esso moved for summary judgment (R11a), appending several affidavits to its notice of motion (R12a through 21a). The facts disclosed by these affidavits are that Cooper and Stainless, in 1958, became dissatisfied with the price Gold was charging them for fuel oil and so advised Gold. Gold then reduced its price from 12.7¢ to 12.5¢. In

October 1958 Cooper and Stainless requested Esso to make a survey of their plant to determine whether or not a saving could be made in the cost of No. 2 fuel oil. Cooper and Stainless were using several hundred thousand gallons of this grade oil annually. Esso made a survey and reported to Cooper and Stainless, in a letter of November 6, 1958, that they should continue to use No. 2 fuel oil. It also advised that, for this grade of fuel oil in tank transport quantities, Esso's price was 10.05¢, plus .33¢ for freight, or a total cost of 10.38¢. Cooper and Stainless sought bids from other suppliers, including Gold, and one bidder quoted a price of 10.2¢ delivered at Cooper-Stainless's plant. Cooper and Stainless so advised Esso and stated that it would like to do business with Esso if the above quoted price could be met. Esso agreed to meet the competitive price of 10.2¢. This figure was arrived at by maintaining the basic price for the fuel oil of 10.05¢, but reducing its haulage charge from .33¢ to .15¢. On this basis, Cooper and Stainless awarded the contract to Esso, to become effective December 1, 1958. Gold requested that its contract be continued for 2 weeks beyond that date in order to permit it to adjust its commitments with its suppliers. This request was granted, and Esso's contract actually became effective December 16, 1958.

By way of counter-evidence, Gold submitted at the hearing, in the Chancery Division of the Superior Court of New Jersey, November and December, 1958 issues of the daily (Monday through Friday) Journal of Commerce, showing daily posted fuel-oil tank-car prices at New York Harbor, inter alia. These exhibits (R75a through 87a, R43a through 73a) show that, on November 24, 1958, the price to resellers

went up from 9.9¢ to 10.4¢ (R83a), and, on December 16, 1958, from 10.4¢ to 10.7¢ (R67a). There was nothing in any of the affidavits submitted by Esso in support of its motion, or anywhere else in the case, to show that Esso's successful bid of 10.2¢ was accepted prior to November 24, 1958, when the price to resellers rose from 9.9¢ to 10.4¢.

The Raising and Decision of the Federal Questions Below.

All the federal questions here raised and asserted below were determined adversely to Gold in the per curiam opinion of the Supreme Court of New Jersey (Appendix A hereto), which reads:

> "The judgment is affirmed solely for the reasons expressed by the trial court with respect to the absence of jurisdiction of the state court to entertain the alleged cause of action." 59 N. J. Super. 6, 16, 18 (Ch. Div. 1959)"

Such federal questions were raised below as follows:

1. The headnote of Point One, F, 4, in Gold's brief in the Appellate Division of the Superior Court of New Jersey—the Supreme Court of New Jersey certified the appeal of its own motion—read (Db24):

> "4. The amended complaint adequately sets forth factually the tort of unfair competition by the defendant by means in violation of 15 U. S. C. A. 13a."

The opinion of the Chancery Division, 59 N. J. Super., at page 15 (R30a) read, in part:

"• • • There are no facts pleaded or set forth in plaintiff's affidavits, or other evidence, which bring the acts of Esso within the orbit of the conduct proscribed by the cited statutes, assuming that these statutes give the plaintiff a cause of action in this court."

2. Such portion of the Chancery Division opinion applies also to the headnote of Point One, F, 3, in Gold's brief below, which read:

"3. The amended complaint adequately sets forth factually the tort of unfair competition by the defendant by means in violation of 15 U. S. C. A. 2."

3. The headnote of Point One, F, in Gold's brief below, read:

"F. The amended complaint adequately sets forth a claim upon which relief can be granted, i. e., the actionable tort of unfair competition, in that the defendant's competition with the plaintiff was conducted by illegal means, per violation of federal anti-trust statutes."

The Chancery Division opinion reads, in part (59 N. J. Super., at pages 12-13, R27a):

"• • • As will be shown hereafter, the plaintiff's cause of action, if it has one, is a right which did not exist at common law and was created by a federal statute, in which statute plaintiff is given an adequate remedy, which is not cumulative, but exclusive."

4. The headnote of Point One, G, of Gold's brief below, read:

"G. The court below had jurisdiction to adjudicate that Esso has been and is guilty of unfair competition by criminal means, i. e., in violation of the federal anti-trust statutes."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 16, R31a):

"The general rule is well settled that only the federal courts have jurisdiction over anti-trust suits."

5. The headnote of Point One, G, 4, of Gold's brief below, read:

"4. In any event, the court below may give relief from the tort of unfair competition, since this action is not one for the enforcement of sections 1, 2 and 13a."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 17, R31a-32a):

"It is clear, despite plaintiff's assertion to the contrary, that this action is one based solely upon the federal statute and, there being a complete and adequate remedy in the federal court, there is no reason why this suit should be continued in this court."

6. The headnote of Point One, G, 3, of Gold's brief below, read:

"3. Furthermore, section 13a of Title 15 may be enforced directly in a state court suit for damages other than treble."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 16, R31a):

> "• • • It (Gold) admits that no private right of action exists in the federal court for a violation of 15 U. S. C. A. sec. 13a, • • •."

And (59 N. J. Super., at pages 17-18, R32a-33a):

> "• • • Thus, it is clear that the remedy given to the plaintiff for any injury caused by the violation of the anti-trust laws by Esso is actionable in the federal courts. And, it is only actionable there."

7. The headnote of Point Two, b, of Gold's brief below, read:

> "B. The fact that Esso was invited to bid by the plaintiff's customers cannot excuse a violation of sections 1, 2 or 13a of Title 15."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 14, R29a):

> "Esso did not seek this business, but, along with other suppliers, including the plaintiff, was asked by Cooper to submit bids. • • • If the defendant's motives were proper, and the means used were proper, there is no unfair competition."

Reasons Relied on for Allowance of the Writ.

The foregoing questions are ones of substance and nation-wide importance not heretofore determined by this Court.

1. The 10.2¢ price at which Esso sold to Cooper and Stainless was unreasonably low and for the purpose of eliminating Gold as a competitor. "It is, indeed, 'unreasonable, per se,' to foreclose competitors from any substantial market." *United States v. Griffith*, 334 U. S. 100, 107. "It is clear that Congress by the Clayton Act and Robinson Patman Act barred the use of interstate business to destroy local business, • • •." *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 120 (1954). "The recognized purpose of the Robinson-Patman Act is to reach the operations of large interstate business in competition with small local concerns." *Standard Oil Co.* v. *Trade Comm'n*, 340 U. S. 231, 237-38 (1951). The purpose of the act is to protect small business against monopoly-producing practices by large competitors. 70 Harv. L. Rev. 1490, 1493 (1957). "Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors." *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir. 1929). "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of

a competitor." *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (10th Cir. 1959).

2. Paragraph 11 of the amended complaint at bar reads (R8a):

> "The said sale is in violation of Title 15, U. S. C. A. Sec. 2, in that it is but one of a series of similar sales direct to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase in the fuel oil market for resale, thus constituting an attempt by • • • Esso • • • to monopolize a part of interstate commerce in fuel oil; and is therefore not fair competition."

"To monopolize trade or commerce, or part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons." *Patterson* v. *United States*, 222 F. 599, 619 (6th Cir. 1915). "It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing." *National Biscuit Co.* v. *Federal Trade Commission*, 299 F. 733, 738 (2d Cir. 1924), cert. den. 266 U. S. 613. "Monopoly can as surely thrive by the elimination of • • • small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact, the Sherman Act has constantly been read to forbid all contracts and combinations 'which "tend to create a monopoly,"' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.'" *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 357 U. S. 207, 213-14 (1959). "'Trade or commerce • • • may • • • be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. • • •'" *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 467 (1941).

3. The New Jersey courts may give relief from the tort of unfair competition, since this action is not one for the enforcement of sections 2 and 13a. Art. VI, cl. 2, of the United States Constitution says:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in each State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceeding before them." *U. S.* v. *Bank of New York Co.*, 296 U. S. 463, 479 (1936). The state courts have jurisdiction in actions brought independently of the federal statutes for some wrong done, where the federal statutes come incidentally into operation by reason of some regulatory provision contained therein and where the action itself is brought neither for a violation or enforcement of the federal statute nor for the purpose of assailing the validity or legal efficacy of the provisions of the federal statute. *Kells Mill & Lumber Co.* v. *Penn. R. R. Co.*, 89 N. J. L. 490 (S. C. 1916), affirmed 90 Id. 325 (E. & A. 1917).

To paraphrase *De Koven* v. *Lake Shore & M. S. Ry. Co.*, 216 F. 955, 957-58 (S. D. N. Y. 1914), an action in tort, i. e., in trespass on the case, for unfair competition, is a well recognized species of common-law jurisdiction of courts of law. * * * It is not a mere statutory remedy, conferred by the federal antitrust statutes. The plaintiff would be entitled to resort to this remedy if the Sherman Act had pro-

vided no remedy in damages for its enforcement, and the fact that it did provide a remedy for 15 U. S. C. A. 13a, available only to the United States, cannot be held to deprive an individual of a legal remedy which was open to him before and independent of the statute. The fact that the illegal act is made so only by the statute cannot change the result.

It is true that the acts of Esso complained of here would not have given rise to a cause of action at common law. That, however, was so, not because there was no cause of action at common law for illegal competition, but because at common law the acts of Esso complained of here were not illegal. By the antitrust statutes relied upon at bar by the plaintiff, such acts are illegal, and therefore enable the plaintiff to maintain a common-law action for damages in a state court for illegal, i. e., unfair, competition. "The operation of such a statute, in fine, is that the defendant's duty toward the plaintiff as affected by such statute takes the place of what would have been his common law duty if such statute had not been enacted, * * *." *Evers* v. *Davis*, 86 N. J. L. 196, 205 (E. & A. 1914).

A state court has jurisdiction on the basis of the general principles of the law of torts to give a private remedy when a competitor has been injured by unfair competition. The federal statutes set a standard of unfair competition. 33 Mich. L. Rev. 321, 336 (1935). And in *Caraway* v. *Ford Motor Company*, 148 F. Supp. 776, 777 (W. D. Mo. 1957), the court says:

> "A person who has been injured in his trade or business by the activities of an unlawful monopoly, combination or restraint is entitled to recover damages in an action at law for the loss suffered, re-

covery being sustainable both at common law and under the federal anti-trust statutes. Southern States Hotel Co. v. Standard Oil Co. of New Jersey, 26 F. Supp. 633; * * *."

4. Section 13a of Title 15 may be enforced directly in a state court suit for damages other than treble. "A state court has jurisdiction of a suit of a civil nature arising under the laws of the United States, where the federal courts do not have jurisdiction of such a suit." *Christner* v. *Poudre Valley Cooperative Assn.*, 235 F. 2d 946, 951 (10th Cir. 1956). See, also, *Claflin* v. *Houseman, Assignee*, 93 U. S. 130, 136-37 (1876); *U. S.* v. *Bank of New York Co., supra; Murray* v. *Chicago & N. W. Ry. Co.*, 62 F. 24, 43 (C. C., N. D. Iowa, 1894); *Ex parte Martin*, 180 F. 209, 211 (C. C., D. Ore., 1910).

As this Court well knows, a private action for treble damages may not be maintained for practices violating only section 3 of the Robinson-Patman Act, viz., 15 U. S. C. sec. 13a. *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373 (1958).

5. The fact that Esso was invited to bid by Cooper and Stainless cannot excuse a violation of sections 2 and 13a of Title 15. Neither of such sections excepts from its provisions persons who are invited by the consumer to compete for his custom. An invitation to an interstate giant to compete with local small business cannot be deemed to endow the former with carte blanche to set at naught the policy and prohibitions of the anti-trust laws of Congress, and as well the beneficent and comprehensive common-law and equitable principles distinguishing between fair, and unfair and illegal, competition.

Conclusion.

It is therefore respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

Respectfully submitted,

POLLIS & PAPPAS,
Attorneys for Petitioner,

By MICHAEL J. PAPPAS,
A Member of the Firm.

SAM WEISS,
On the Petition.

APPENDIX A.

Opinion of the Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY.

A-128. SEPTEMBER TERM 1959.

GOLD FUEL SERVICE, INC., a corporation of the State of New Jersey,
Plaintiff-Appellant,
vs.
ESSO STANDARD OIL COMPANY, a corporation of the State of Delaware,
Defendant-Respondent.

Argued May 24, 1960. Decided June 6, 1960.

MR. SAM WEISS argued the cause for plaintiff-appellant. (MESSRS. POLLIS, WILLIAMS & PAPPAS, attorneys.)

MR. BURTIS W. HORNER argued the cause for defendant-respondent. (MESSRS. STRYKER, TAMS & HORNER, attorneys.)

PER CURIAM.

The judgment is affirmed solely for the reasons expressed by the trial court with respect to the absence of jurisdiction of the state court to entertain the alleged cause of action. 59 N. J. Super. 6, 16, 18 (Ch. Div. 1959).

APPENDIX B.

Mandate of the Supreme Court of New Jersey.

This cause having been duly argued before this Court by Mr. Sam Weiss, counsel for the appellant and Mr. Burtis W. Horner, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the HONORABLE JOSEPH WEINTRAUB, Chief Justice, at Trenton on the sixth day of June, 1960.

FILED
Jun 6 1960
John H. Gildea
Clerk

JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX C.

Pertinent Excerpts from Federal Constitutional and Statutory Provisions.

Article VI, clause 2, of the Constitution of the United States provides, in part:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in each State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

15 U. S. C. sec. 2 provides, in part:

> "Every person who shall monopolize, or attempt to monopolize, * * * any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments."

15 U. S. C. sec. 13a provides, in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

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IN THE

Supreme Court of the United States

October Term, 1950

No. 361

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Petitioner-Petitioner

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Opinions Below.

The opinion of the Chancery Division of the Superior Court of New Jersey is reported at 59 N. J. Super. 6, 157 A. 2d 30. The opinion of the Supreme Court of New Jersey is reported at 32 N. J. 459, 161 A. 2d 246 and appears at page 17 of the petition.

Jurisdiction.

Respondent contends that jurisdiction under 28 U. S. C. §1257 is lacking for the following reasons:

No Federal question is presented in that petitioner has failed to assert a claim of denial of a federal right and has

consistently asserted rights based only on the common law of New Jersey.

Questions Presented.

1. Does this Court have jurisdiction under 28 U. S. C. §1257 to grant a writ of certiorari where the petitioner has relied only on the common law of New Jersey and has failed to state what federal right has been denied?

2. Do "special and important reasons" exist within the meaning of Rule 19 of the Revised Rules of this Court for the granting of the writ where authority for the existence of any federal right which petitioner might be claiming is entirely lacking and where petitioner has sought identical relief in the District Court for the District of New Jersey?

3. Did the Supreme Court of New Jersey commit error in deciding that all causes of action arising under the anti-trust laws, 15 U. S. C. §§1, 2 and 13a, were within the exclusive jurisdiction of the federal courts?

Statement of the Case.

This action was originally brought against the Esso Standard Oil Company (hereinafter referred to as "Esso"), a manufacturer and distributor of fuel oil, and Cooper-Alloy Corporation (hereinafter referred to as "Cooper") and Stainless Engineering and Machine Works (hereinafter referred to as "Stainless"), two consumers, upon a theory of maliciously interfering and unfairly competing with Gold Fuel Service, Inc. (hereinafter referred to as "Gold") which had formerly been supplying the consumer defendants (R1a). Before any of the defendants

had filed their answers, Gold's motions to amend its complaint and to dismiss as to Cooper and Stainless were granted and the case continued against Esso, although on a somewhat altered theory (R6a).

In the amended complaint, Gold repeated its allegations of unfair competition, but based those charges on asserted violations of the Robinson-Patman and Sherman Acts, 15 U. S. C. §§13a, 1 and 2. Esso then moved to dismiss this amended complaint on the ground that no claim for relief had been stated, coupled with a motion for summary judgment supported by affidavits. These motions were granted and judgment entered thereon (R23a). (See report of case at 59 N. J. Super. 6, 157 A. 2d 30.) On appeal, the New Jersey Supreme Court affirmed (P17). 32 N. J. 459, 161 A. 2d 246.

Gold, or its predecessor, a distributor of fuel oil, had been supplying Cooper and Stainless with a major portion of their requirements for some years prior to 1958. These consumers became dissatisfied with the price at which said oil had been furnished to them and decided to investigate the possibility of savings in this connection, both as to price and as to the type of oil being used. Gold was advised of this change in attitude and, shortly thereafter, reduced its price slightly from 12.7 to 12.5 cents per gallon (R17a).

During October, 1958, an executive of both consumer companies met with Esso's Industrial Sales Manager, explained the price problem and invited Esso to survey the consumers' operations and submit a bid. In view of the quantities of oil consumed by Cooper and Stainless, Esso's Industrial Sales Manager believed that they should purchase their oil requirements on a "tank transport" basis, and he advised them that Esso sold oil to purchasers in such quantities. During these negotiations, the price for "tank transport" quantities was 10.05 cents per gallon

plus a haulage charge if delivery were to be made by Esso (R16a).

After a survey of the consumers' plant, Esso concluded that the type of fuel oil purchased from Gold should be continued and orally advised them that Esso would furnish the oil at the prevailing price plus a normal delivery charge, then 10.05 cents per gallon plus .33 cents for freight (R14a-15a). This offer was subsequently put into writing and sent to the consumers (R15a).

Shortly after this quotation was submitted, Esso learned that several other suppliers had been invited by the consumers to bid for this business and at least one had quoted a delivered price of 10.2 cents per gallon. The consumers, preferring to do business with Esso, asked whether or not Esso wished to meet this price. Esso revised its quotation to meet this competitive situation, and its bid of 10.2 cents per gallon (10.05 cents per gallon plus a reduced delivery charge of .15 cents) was accepted (R17a).

Gold had been invited to compete with the other suppliers, but its price of 11.4 cents per gallon, delivered, was the highest quotation and was 1.2 cents per gallon in excess of the lowest quotation. It should be noted that Gold, in attempting to compete in the bidding, had reduced its price from 12.5 cents, itself a reduction of its former price, to the 11.4 figure (R21a).

Although the petition attempts to supply confusion as to the proper delivered price of the oil as of December 16, 1958, the date when Esso commenced delivery (P6, 7), the delivered price at that time under Esso's proposal was 11 cents per gallon. This consisted of the original delivered price of 10.2 cents plus the November 21st increase of .5 cents and the December 16th increase of .3 cents.

There is no denial, by petitioner, of the manner in which bids were invited nor of the prices which defendant has

set forth. Gold has never contradicted the assertion that it was unable to compete, not only with Esso, but with other bidders for the job. Significantly it does not refute the statement that any consumer could have purchased fuel oil in the quantities in question at the price noted, and the very issues of the "Journal of Commerce" upon which Gold relies (R43a-87a) show a lower price to a reseller than a consumer (R29a).

Both the original and amended complaints alleged the common law tort of interference with business relations based upon unfair competition. In the amended complaint, there was no basic alteration, but alleged violations of the Sherman and Robinson-Patman Acts, 15 U. S. C. §§1, 2 and 13a were added. Gold contended that these statutes set forth a standard which is absorbed into the public policy of New Jersey and the violation thereof, it maintained, constituted a basis for recovery on the common law theory of trespass on the case or unfair competition. Although Gold urged that no relief was sought under the federal statutes, it appeared that no relief could conceivably be granted upon the facts as set forth by Gold, except thereunder. (See opinion of the Chancery Division of the Superior Court at 59 N. J. Super. 6, 157 A. 2d 30.)

An appeal was taken by Gold from the judgment of the Chancery Division and the Supreme Court of New Jersey affirmed the lower court's decision. This affirmance was restricted to the question of jurisdiction to entertain the common law cause of action asserted by plaintiff, the court holding that the cause of action, if any, was solely for violation of the federal statutes and, as such, was cognizable only in the federal courts (P17). The present petition for the issuance of a writ followed.

Reasons for Denying the Writ.

POINT I.

This Court has no jurisdiction to review in that the petitioner's entire cause of action is based on the common law of New Jersey.

Review of the decision of the Supreme Court of New Jersey is afforded by way of writ of certiorari only in the event that the petitioner has fulfilled the statutory requirements of 28 U. S. C. §1257 (c). The pertinent portion of that statute allows review:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

An examination of the record in the cause not only reveals a failure to claim any right, privilege or immunity of the required character, but affirmatively sets forth an asserted cause of action within the framework of the New Jersey common law.

The complaint seeks relief for unfair competition and a malicious interference with business relations (R8a). The means by which the unfair competition and malicious interference were carried out are alleged to be through violations of the anti-trust laws, 15 U. S. C. §§1, 2 and 13a, but these statutory sections are not relied upon except as

a so-called "standard" which are alleged to have become a part of New Jersey's public policy.

Thus, at page 18 of the petitioner's brief below it is said:

> **"F. The amended complaint adequately sets forth a claim upon which relief can be granted, i. e., the actionable tort of unfair competition, in that the defendant's competition with the plaintiff was conducted by illegal means, per violation of federal anti-trust statutes.**
>
> "It is respectfully urged that the amended complaint was not vulnerable to the motion to dismiss, for the reason that it sets forth sufficiently a claim for relief for an actionable tort of unfair competition. The competition is unfair because it involves the pursuit of illegal, criminal means, the success of such competition being grounded upon violation of 15 U. S. C. A. 1, 2 and 13a."

And at page 29, petitioner asserted:

> "It cannot be overemphasized that the instant action is *not* upon any of the federal anti-trust statutes, but is at common law for the tort of unfair competition by illegal means."

At pages 33 and 34, respectively, the following contentions are advanced:

> "By the antitrust statutes relied upon at bar by the plaintiff, such acts are illegal, and therefore enable the plaintiff to maintain a common-law action for damages in a state court—the one below—for illegal, i. e., unfair, competition."
>
> * * * * * *
>
> "A state court has jurisdiction on the basis of the general principles of the law of torts to give a

> private remedy when a competitor has been injured by unfair competition. The federal statutes set a standard of unfair competition."

It is, therefore, clear that no federal right has ever been asserted by petitioner, but, instead, it has sought relief by means of the New Jersey common law action of trespass on the case (R26a). The Supreme Court of New Jersey has declared that its public policy does not require the entertaining of such a cause of action and has also pointed out that petitioner's remedy, if any, lies in the federal courts. Under such circumstances this court has no basis for review, for it is bound by the decision of the state court as to its law. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680 (1930); see also *Scripto* v. *Carson*, 362 U. S. 207, 210 (1960); *Williams* v. *Kaiser*, 323 U. S. 471, 473 (1944); *General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335, 337 (1943); *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 272, 273 (1927). The refusal of the state courts to exercise jurisdiction, in itself, presents no denial of a federal right, such determination being a matter purely of state law and, in the absence of federal questions, not reviewable by this court. *Kersh Lake Dist.* v. *Johnson*, 309 U. S. 485, 489 (1940); *Smith* v. *Adsit*, 16 Wall. (83 U. S.) 185, 189 (1872); *Caldarola* v. *Eckert*, 332 U. S. 155, 158 (1947).

Petitioner relies upon Article VI, Clause 2, the Supremacy Clause of the United States Constitution, and cites other authority for the proposition that it is the duty of the State courts to guard and enforce every "right" secured by federal law (P13). This may be conceded, but the federal "right" now alleged is contrary to the cause of action heretofore asserted in this case. On page 13 of the petition, it declares:

> "The New Jersey courts *may* give relief from the tort of unfair competition, since this action is not one

for the enforcement of sections 2 and 13a of 15 U. S. C." (emphasis added).

However, no authority is cited for the proposition that, under the Supremacy Clause, there is a "right" to have the courts of the State of New Jersey provide a common law cause of action for unfair competition based upon the standards set forth in the anti-trust laws. Such a contention cannot be sound, for, surely, it is the duty of the New Jersey Courts to declare any unresolved question of policy.

The identification of the precise federal right alleged is very difficult from an examination of the petition. Much is made of the various provisions of Title 15, U. S. C. but, as noted above, the alleged violations thereof merely set up a "standard" which, it is claimed, New Jersey should enforce.

It is a settled rule of this Court that the assertion of a claim of the denial of a federal right sufficient to give this court jurisdiction must be made unmistakably by way of distinct and positive averments, and not left to mere inference, and it must appear that the party claiming the right plainly and distinctly indicated to the state court that such right was claimed under the Constitution, treaties or statutes of the United States. This principle applies even though the party seeking review may, in point of fact, have had a federal right which could have been asserted. The failure to present the federal question is sufficient. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 642, 654-655 (1897). See also *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308-310 (1903); *Bolln* v. *Nebraska*, 176 U. S. 83, 91-92 (1900); *Dewey* v. *Des Moines*, 173 U. S. 193, 198-200 (1899); *Kipley* v. *Illinois*, 170 U. S. 182, 186-187 (1898); *Levy* v. *Superior Court*, 167 U. S. 175, 177-178 (1897).

As the court stated in *Dewey* v. *Des Moines* at page 199,

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour*, 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Company* v. *Patten Paper Company*; and *Bank of Lincoln* v. *Bank of Cadiz*, *supra*."

Petitioner has not made clear, either in this petition or below, exactly what federal right is claimed to have been denied. As the Court may readily observe, respondent has been compelled to formulate its argument on the basis of a federal right which has not been asserted by petitioner, but which has been arrived at by respondent by means of conjecture. Certainly, if petitioner has asserted a denial of any federal right, it has, at best, been left to mere inference.

Parenthetically, it would also appear pertinent at this juncture to note Rule 24(5) of the Revised Rules of this Court which states:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

It is apparent from the foregoing discussion that petitioner has not only failed to assert a federal right, but it has based its claim on the state law. If some nebulous federal right may exist under the circumstances of the case at bar, it has not been defined with that degree of precision which would permit appellate review.

POINT II.

There are no special and important reasons for allowing this petitioner to litigate in the New Jersey courts where all relief to which it may be entitled is available in the federal courts.

Rule 19 of the Revised Rules of this Court requires that the allowance of a writ be based on substantial considerations. No such reasons are advanced in the petition and none can be discerned. Indeed, the pursuit of a remedy under state law on such a bizarre theory would seem to be superfluous in view of the fact that petitioner is also suing in the federal court for the District of New Jersey for the same relief sought herein (R26a). In that litigation treble damages are sought directly for violations of the very statutes mentioned herein.

It is respondent's position that the petition is so devoid of merit as to be frivolous, since any issue involving federal law which it might raise would be so unfounded in substance as not to be cognizable in this Court. See *Wilson* v. *North Carolina*, 169 U. S. 586, 595 (1897), citing *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 532 (1893). See also, *Corrigan* v. *Buckley*, 271 U. S. 323, 329 (1926); *United States Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111, 112 (1919); *Parker* v. *McLain*, 237 U. S. 469, 471-472 (1915); *Iowa* v. *Rood*, 187 U. S. 87, 92 (1902); *New Orleans Water-*

works Co. v. *Louisiana*, 185 U. S. 336, 344 (1902); *New Orleans* v. *New Orleans W. W. Co.*, 142 U. S. 79, 87 (1891). These cases demonstrate that the requirement of substance has been considered jurisdictional by this Court.

POINT III.

Exclusive jurisdiction of violations of the statutes in question lies with the federal courts.

Assuming that the petitioner is entitled to a day in court on the merits, the Supreme Court of New Jersey was clearly correct in holding that the federal courts had exclusive jurisdiction of any cause of action that petitioner may have. The cause of action asserted below was actually a curious hybrid which combined various elements of common law unfair competition and the federal anti-trust statutes (P17). Petitioner admits (P14) that the acts of respondent would not give rise to a common law cause of action for unfair competition and summary judgment in the trial court was, in part, based upon such admission. See 59 N. J. Super. at 12, 157 A. 2d at 33. There being no existing New Jersey common law action based on federal anti-trust standards, the trial court concluded (59 N. J. Super. at 17, 157 A. 2d at 35), and the New Jersey Supreme Court agreed (P17), that the state courts have no jurisdiction over this type of case since it is based solely on federal statutes, the enforcement of which is within the exclusive jurisdiction of the federal courts.

As was declared under Point "I" herein, no authority has been cited for a theory that the Supremacy Clause requires the state to provide a right of action based upon federal anti-trust statutes. On the contrary, many decisions of this Court as well as the lower federal courts hold

that the enforcement of these laws is within the exclusive jurisdiction of the federal courts. *General Investment Co. v. Lake Shore & Mich. Southern Ry. Co.*, 260 U. S. 261 (1922); *Caraway v. Ford Motor Company*, 148 F. Supp. 776 (Dist. Ct., W. D. Mo., 1957); *Caraway v. Ford Motor Company*, 144 F. Supp. 295 (Dist. Ct., W. D. Mo., 1956); *United Artists Corp. v. Ancare Amusement Corp.*, 91 F. Supp. 132 (Dist. Ct., S. D. N. Y., 1950); *Bee Machine Co. v. Freeman*, 42 F. Supp. 938 (Dist. Ct., D. Mass., 1942), rev'd on other gr'ds 131 F. 2d 190, aff'd 319 U. S. 448; *Southern States Oil Co. v. Standard Oil Co.*, 26 F. Supp. 633 (Dist. Ct., E. D. S. C., 1939). The remedies provided thereby are exclusive. *Geddes v. Anaconda Mining Co.*, 254 U. S. 590 (1921); *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165 (1915). See also *Switchmen's Union v. Board*, 320 U. S. 297 (1943); *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445 (1897); *Fourth National Bank v. Franklyn*, 120 U. S. 747 (1886); *United States v. Kaufman*, 96 U. S. 567 (1877); *Pollard v. Bailey*, 20 Wall. (87 U. S.) 520 (1874).

As was stated above, petitioner has recognized the force of these authorities by seeking the very relief provided by the statutes which he cites in an action which is currently pending in the District Court for the District of New Jersey.

This policy of exclusion has been followed in the most recent decisions of this Court. In *Kelly v. Kosuga*, 358 U. S. 516 (1959), reh'g den. 359 U. S. 962, the plaintiff contended that the lower court erred in striking an affirmative defense based on the argument that the contract sued upon was a part of a scheme in violation of section 1 of the Sherman Act. On certiorari, the Supreme Court affirmed, stating, per Mr. Justice Brennan, at p. 518:

"As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, one who had purchased merchandise from a firm allegedly a combination in restraint of trade was not allowed to set up that fact as a defense to an action for the purchase price. In *D. R. Wilder Mfg Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, Corn Products sold merchandise to Wilder with a standing offer, of which the latter apparently had sought to take some advantage, to give Wilder a rebate if it bought exclusively from it. Again, in an action by the seller, Corn Products, to recover the agreed price, the purchaser, Wilder, was denied any defense of illegality based on the Sherman Act. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. *Id.*, at 174-175. Cf. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755. See *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252, generally to the same effect. Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176-177, even in diversity actions in the federal courts after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act."

And in *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373 (1957) reh'g den. 355 U. S. 967, the Court had occasion

to consider the exclusive nature of the criminal section of the Robinson-Patman Act. At page 377 the Court stated:

> "* * * The important thing to note is that this section, in contrast to §1 of the Robinson-Patman Act, does not on its face amend the Clayton Act. Further, §3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. See *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174-175."

See also *Safeway Stores, Inc.* v. *Vance, Trustee*, 355 U. S. 389 (1958), reh'g den. 356 U. S. 910.

Petitioner has also advanced the proposition that a civil cause of action will lie in the state courts for the alleged violation of the Robinson-Patman Act, 15 U. S. C. §13a. Such a contention is clearly untenable in view of the *Nashville* case *supra*. At pages 378-379 thereof this court said:

> "Because there is a partial overlap between the price-discrimination clauses of §3 of the Robinson-Patman Act (see note 1, *supra*) and those of §2 of the Clayton Act, as amended by the first section of the Robinson-Patman Act, it is argued that it would be anomalous to allow a private cause of action for price discrimination in violation of §2 of the Clayton Act but to deny a private cause of action based on a violation of §3 of the Robinson-Patman Act. This argument, however, overlooks the fact that §3 of the Robinson-Patman Act includes a provision which is *not* found in §2 of the Clayton Act, namely, selling 'at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.'

> It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision was among the factors which led Congress to leave the enforcement of the provisions of §3 solely in the hands of the public authorities, except to the extent that violation of any of its provisions also constituted a violation of §2 of the Clayton Act, and as such was subject to private redress under §§4 and 16 of that Act. * * *"

This Court concluded, at page 382:

> "For the foregoing reasons, we hold that a private cause of action does not lie for practices forbidden only by §3 of the Robinson-Patman Act. To the extent that such practices also constitute a violation of §2 of the Clayton Act, as amended, they are actionable by one injured thereby solely under that Act. Since no such infringement of §2 is alleged here, the complaint in this case was properly dismissed."

Respondent submits that, under the *Nashville Milk Co.* decision, no private remedy is available under section 13a of 15 U. S. C. in the state courts or in the federal courts, and that any contention that this section is enforceable in the state courts is unsound, especially in light of the authority cited above with respect to exclusive nature of the jurisdiction of the federal tribunals.

Conclusion.

It is evident from this brief review of the record below that no federal right was ever asserted and that a novel common law theory was advanced. This theory was rejected by the New Jersey courts and the petitioner left to any

remedies it may have under the statutes in question as provided by Congress in the federal courts. The writ of certiorari should be denied.

By JOHN J. MONIGAN,
Attorney for Defendant-Respondent,
Esso Standard Oil Company.

DATED: September 16, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 361

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY BRIEF FOR PETITIONER.

CHARLES A. RAPPA
[illegible]
[illegible]

SAM WEISS
[illegible]
[illegible]

Esso's brief (p. 4) in opposition to the petition for writ of certiorari states:

> "Although the petition attempts to supply confusion as to the proper delivered price of the oil as of December 16, 1958, the date when Esso commenced delivery (P6, 7), the delivered price at that time under Esso's proposal was 11 cents per gallon. This consisted of the original delivered price of 10.2 cents plus the November 21st increase of .5 cents and the December 16th increase of .3 cents."

The petition does not attempt to supply any confusion as to Esso's *bid* price of 10.2 per gallon, delivered. None of Esso's affidavits fixes precisely the date on which its 10.2 bid was accepted. *If* Esso's bid had been accepted prior to November 24, 1958, when the posted price for No. 2 oil rose from 9.9 to 10.4 (R79a to 83a), then the bid to the plaintiff's customers would have been based upon the posted price of 9.9 (plus .15 to a consumer—see footnotes in Journal of Commerce issues), to which was added a reduced delivery charge of .15 (reduced from Esso's original delivery-price addition of .33, which, according to one of Esso's own affiants, was the *normal* haulage charge—R13a-17), totaling 10.2. But this Court will scan Esso's affidavits in vain for any words which definitely fix the date of the acceptance of Esso's bid as being prior to November 24, 1958. The papers supporting a motion for summary judgment are required to be closely scrutinized; those opposed to it indulgently treated. Doubts must be resolved in favor of the conventional trial. *West Side Trust Co. v. Gioscigno*, 39 N. J. Super. 467, 470 (A. D. 1956, per Francis, *J. A. D.*). Upon such scrutiny and resolution, Esso's affidavits must be held not to have overcome paragraphs 7 and 8 of the first count of the amended complaint (R8a-8

to 22), to the effect that Esso's 10.2 price was below the rate at which the plaintiff could purchase fuel oil from any of the suppliers in the industry, i.e., at the current posted price of 10.4, after November 24, 1958. (On December 16, 1958, the posted price started going up from 10.4 to 10.7, R67a to 73a.)

The only proposals of Esso that were set forth in its affidavits were the 10.38 bid that was rejected and the 10.2 bid that was accepted. There is nothing in any of its affidavits to show that the 10.2 *accepted* bid was subject to increase, on increase of posted prices.

2.

Esso's brief (p. 5) further states:

> "* * * Gold has never contradicted the assertion that it was unable to compete, not only with Esso, but with other bidders for the job."

Such contradiction was unnecessary. Gold has no cause of action against any competitor whose bid price was not illegal, i.e., not at a figure below the posted price to purchasers for resale. Esso's bid was below such posted price, so far as its affidavits on the motion revealed.

3.

Esso's brief (p. 5) further states:

> "* * * Significantly (Gold) does not refute the statement that any consumer could have purchased fuel oil in the quantities in question at the price noted, and the very issues of the 'Journal of Commerce' upon which Gold relies (R43a-87a) show a lower price to a reseller than a consumer (R29a)."

It is true that the journal issues do show invariably a lower posted price to a reseller than a consumer—.15 lower. However, Esso's bid of 10.2 was .35, not .15, lower than the November 24 consumers' posted price of 10.55, i.e., 10.4 plus .15. No reseller, after November 24, could have purchased at 10.2, when the posted price was 10.4.

4

Esso's brief (p. 8) further states:

> "It is, therefore, clear that no federal right has ever been asserted by petitioner, but, instead, it has sought relief by means of the New Jersey common law action of trespass on the case (R26a)."

Esso fails to distinguish between right and remedy. By virtue of Title 15, U. S. C., Sec. 2, the plaintiff was given the right not to have any competitor attempt to monopolize a part of interstate commerce, to the plaintiff's injury. By virtue of Title 15, U. S. C., Sec. 13a, the plaintiff was given the right not to have any competitor sell at unreasonably low prices for the purpose of destroying competition or eliminating the plaintiff as a competitor, to the plaintiff's injury. By virtue of Esso's actions counted upon in the amended complaint at bar, a common law cause of action consisting of the remedy of trespass on the case for unfair, i.e., illegal, competition existed by reason of the fact that a duty upon Esso not to do any of the things condemned by Secs. 2 and 13a was imported into such common law cause of action as an element and basis of Esso's liability. The fact that a remedy therefor may or may not exist under the remedial provisions of Title 15 is immaterial, since the action at bar is not for the enforcement of Secs. 2 and 13a, and the jurisdiction of the New Jersey

state courts to afford the common law remedy in question has not, therefore, been impaired or defeated by the federal statutory remedial sections.

Respectfully submitted,

POLLIS & PAPPAS,
Attorneys for Petitioner.

By MICHAEL J. PAPPAS,
A Member of the Firm.

SAM WEISS,
On the Petition.